FILED
JUL 27 1988

NO. 87-2052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

M.E.F. ENTERPRISES, INC. and
M.K.D. ENTERPRISES, INC.,
Petitioners

v.

THE CITY OF HOUSTON, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Fifth Circuit properly apply the holding in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) to a City of Houston ordinance regulating the location, exterior color and signage of sexually oriented businesses?

LIST OF PARTIES

Petitioners:

M.E.F. Enterprises, Inc. and M.K.D. Enterprises, Inc.

Respondents:

The City of Houston, Texas

Jerry E. Smith, in his official capacity as City Attorney of the City of Houston, Texas.

Lee P. Brown, in his official capacity as Chief of Police for the City of Houston, Texas.

The following is a list of all parties of record in the proceedings in the United States Court of Appeals for the Fifth Circuit who are not parties to the proceedings before this Court:

SDJ, Inc., d/b/a Sugar Babes; W.F.K., Inc. d/b/a Sugar's; W.F.K., Inc. Six d/b/a Sugar's Dejavu; T.D.D., Inc. d/b/a Little Darlings; Evan Lowenstein d/b/a Legacy; Gringo's Saloon, Inc. d/b/a Fantasia; 747, Inc. d/b/a Texas Cowgirls; Two Greeks, Inc. d/b/a Candlelite Lounge; M.B. Tex Enterprises, Inc. d/b/a Imaginations; Spiros Karmaelegos d/b/a Texas Fillies; HI-10, Inc. d/b/a HI-10 Cabaret; Trumps, Inc. d/b/a Rick's Cabaret; Southwest Club Co., Inc. d/b/a Playmates; SSD, Inc. d/b/a Ritz Cabaret; Aris Mylonas d/b/a Bogey's; Jimmy Tsarouchas d/b/a Cricket's; J&J, Inc. d/b/a Pink Pussycat; VAT, Inc. d/b/a Yellow Rose of Texas; Alexandria Vivi Barsakis d/b/a Whip Club; Da John, Inc. d/b/a Dream Street.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, the City of Houston, Texas, its City Attorney, Jerry E. Smith and its Police Chief Lee P. Brown, in their official capacities, respectfully requested that this Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case reported as *S.D.J., Inc. v. City of Houston,* 837 F.2d 1268, rehearing denied 841 F.2d 107 (5th Cir. 1988).

The opinion of the District Court is reported as *S.D.J., Inc. v. City of Houston,* 639 F. Supp. 1359 (S.D. Tex. 1986). All of these opinions are reprinted in the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves the constitutionality of a local ordinance regulating the location, exterior decor and signage of sexually oriented businesses. The ordinance provides for the licensing of certain sexually oriented businesses, including topless bars, and regulates their location. The ordinance does not regulate the location of adult bookstores or adult movie theatres, but does regulate the exterior decor and signage of those businesses.[1] A sexually oriented business regulated as to location cannot qualify for a license if it is located within 750 feet of a church, school or licensed day care center. Additionally, a sexually oriented business cannot be located within an area that is more than 75% residential in character. Finally, the ordinance provides that no sexually oriented businesses may be located within 1000 feet of another sexually oriented business. The Petitioners are two corporations owning topless bars subject to the regulations.

The Court of Appeals' opinion correctly states the facts in this case. *S.D.J., Inc. v. City of Houston,* 837 F.2d 1268, 1272-1273. However, Petitioners' Statement of the Facts is incomplete and, to a degree, misleading. Contrary to the Petitioners' assertions, the ordinance was

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1. "A state enabling statute, Tex. Rev. Civ. Stat. Ann. art. 2372w, prohibited the city's regulation of the excepted businesses." *S.D.J., Inc. v. City of Houston,* 837 F.2d 1268, 1272 (5th Cir. 1988). Article 2372w has been recodified as Chapter 243 of the Texas Local Government Code.

enacted only after careful study of local concerns with the secondary effects of adult businesses and after a review of other cities' approaches to solutions to this problem. *S.D.J., Inc. v. City of Houston,* 837 F.2d 1268, 1271.

In addition, expert testimony received by the district court which, together with the legislative reports of the City Council Committee charged with studying the effects of adult businesses on surrounding property, was sufficient to establish that topless bars have an adverse impact on residential property, churches, schools and day care centers. *S.D.J., Inc. v. City of Houston,* 636 F. Supp. 1359, 1367 (S.D. Tex. 1986).

Finally, along with examining the potential adverse effects that topless bars have upon the surrounding land uses, the City Council Committee also examined the effect that the distance regulations would have upon the availability of topless entertainment in Houston. As the Fifth Circuit noted, "[s]everal experts testified as to potential alternative sites, estimating that 'at least 100' and perhaps up to 'tens of thousands' of alternative sites exist." *S.D.J., Inc.,* 837 F.2d at 1277.

REASONS THE PETITION SHOULD BE DENIED

The Fifth Circuit correctly applied the holding in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), to the facts of this case.

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court reexamined the constitutional requirements for local zoning ordinances which regulate the location of adult businesses. *Renton* held

that content-neutral time, place and manner regulations which restrict the location of adult businesses are constitutional so long as they serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *Renton,* 106 S. Ct. at 928, citing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 297 (1984); *City Council v. Taxpayers for Vincent,* 466 U.S. 789, 807 (1981); and *Heffron v. International Society for Krishna Consciousness, Inc.,* 458 U.S. 640 (1981).

In *Renton,* the Court concluded that a local ordinance which was aimed at controlling the secondary effects of adult businesses on the surrounding community rather than at the content of the films would qualify as "content-neutral." *See also, Young v. American Mini Theatres,* 427 U.S. 50, 70 (1976). In addition, this Court held that an ordinance that was "narrowly tailored" to affect only that category of business shown to produce the unwanted secondary effects would be constitutional and avoid the infirmities found in the overbroad ordinances which were struck down in *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981), and *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975).

In *Renton,* the Court held that the fact that the owners of adult businesses must "fend for themselves in the real estate market on an equal footing with other prospective purchasers and lessees does not give rise to a First Amendment violation." *Renton,* 106 S. Ct. at 932. The Court also observed that the First Amendment did not compel local government to provide that speech related businesses, or any other businesses, would be able to obtain sites at bargain prices. The inquiry for First Amendment purposes is not concerned with economic impact. *Renton,* 106 S. Ct. at 932.

The Houston ordinance meets each of these tests. First the Houston ordinance is "content-neutral" in that its predominate concern is with the secondary effects of topless bars.[2] Second, the ordinance is "narrowly tailored" to serve the governmental interests at issue—maintaining neighborhood stability and the quality of life within the City of Houston. The Houston ordinance is not overbroad because it does not reach further than necessary in scope and regulate in a manner unrelated to the governmental interests to be achieved. It only regulates those businesses which have the undesired secondary effects on the surrounding property that the ordinance attempts to mitigate. Third, the Houston ordinance provides for adequate alternative areas of communication by allowing for sufficient available sites for the operation of sexually oriented businesses throughout the City of Houston.

A. The Houston ordinance is content-neutral because it addresses the secondary effects of protected conduct.

The Houston ordinance was passed only after extensive hearings where the City Council reviewed the views of the public and experts regarding the effect of sexually oriented businesses on the surrounding property. (*See,* Preamble to Ordinance No. 86-323, Appendix C to Petition for Writ of Certiorari, pp. 60-63.) These findings contained in the Preamble demonstrate that the City Council's predominate concern was with the secondary effects of topless bars and other sexually oriented businesses, not with the content of the protected

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2. As the Fifth Circuit noted, "[t]he record reflects that the City Council carefully considered the relationship between sexually oriented businesses and neighborhood effects." *S.D.J., Inc.*, 837 F.2d at 1274.

activity. The target of the ordinance was not speech, but the secondary effects of speech, *i.e.*, prevention of crime, maintenance of property values and protection of residential neighborhoods. Because the ordinance is principally concerned with these secondary effects of adult businesses, it is content-neutral and therefore not subject to strict scrutiny as is a content-based regulation. *Renton*, 106 S. Ct. at 929-930.

Petitioners' argument that the Houston ordinance is content-based centers upon an erroneous reading of this Court's recent opinion is *Boos v. Barry*, ____U.S.____, 107 S. Ct. 1157 (1988). That case involved a constitutional challenge to a section of the District of Columbia code which prohibited the display of a sign within 500 feet of a foreign embassy if the sign tended to bring the foreign government into "public odium" or "public disrepute." This Court found that the District of Columbia regulation was content-based because it focused upon the "direct impact" of the speech. *Boos v. Barry*, 108 S. Ct. at 1163. The Court distinguished *Renton* on the basis that "listeners reactions are not the type of 'secondary effects' we referred to in *Renton*." *Boos v. Barry*, 108 S. Ct. at 1163.

Petitioners argue that the Houston regulations focus on the "direct impact" of the speech by asserting that there is a functional equality between "psychological damage" as used in the hypothetical example in *Boos v. Barry* and "dehumanizing influence" as contained in the preamble to the Houston ordinance. This argument ignores the totality of the findings of City Council.[3] The

3. The City Council found that "churches and schools are centers of family oriented activities and therefore enhance the quality of life in surrounding areas" and that "sexually oriented commercial

ordinance was not justified by the desire to prevent any "dehumanizing influence" associated with viewing topless dancers but rather with the effects these businesses have on the surrounding land uses. In contrast, the District of Columbia regulation at issue in *Boos v. Barry* was concerned with preserving the "dignity" of foreign diplomats by shielding them from speech critical of their governments. Here, the Houston ordinance attempts to control the secondary effects of adult businesses rather than control the activities occurring inside of these businesses.[4]

B. The Houston ordinance is narrowly tailored to effectively promote the City's interests in the preservation of the stability of its neighborhoods.

The topless bars argue that the Fifth Circuit's application of the *Renton* decision to the Houston ordinance is in conflict with *City of Watseka v. Illinois Public*

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enterprises can contribute to the impairment of the character and quality of a surrounding residential neighborhood." Additionally, the City Council found that "sexually oriented businesses can contribute to a decline in the value of surrounding properties" and that "sexually oriented commercial enterprises can contribute to an increase in criminal activities in surrounding areas." (*See,* Appendix C to Petition for Writ of Certiorari, p. 61.)

4. The City of Houston has a substantial governmental interest in protecting minors from the possible adverse effects of viewing signs and exterior portions of sexually oriented businesses and in preventing and minimizing the contribution of these signs and exterior portions to the potential decrease in the value of the surrounding property. This interest is both strong and legitimate, *see, Basiardanes v. City of Galveston,* 682 F.2d 1203, 1219, and is especially keen when minors are involved. *See, New York v. Ferber,* 458 U.S. 747 (1982). The provisions of the Houston ordinance affecting the exterior portion and signage of sexually oriented businesses are valid as long as they are directed at the signs themselves rather than at the protected activities. *Borrago v. City of Louisville,* 456 F. Supp. 30, 32 (W.D. Ky. 1978).

Action Counsel, 796 F.2d 1547 (7th Cir. 1986), judg. affirmed ____U.S.____, 107 S. Ct. 919 (1987). They assert that the ordinance must, consistent with this later opinion, be "narrowly tailored" as determined by the "least restrictive means" test and that therefore the City is limited to regulating the exterior signage and color of topless bars.[5]

Petitioners reliance on *Watseka* ignores the precedential value of a number of recent Supreme Court cases: *United States v. Albertini,* 472 U.S. 676 (1985); *Regan v. Time, Inc.,* 468 U.S. 641 (1984); *Community for Creative Non-Violence,* 468 U.S. 288 (1984); and *City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 808-810 (1981). Each of these cases directly addressed the applicability of the least restrictive means analysis and rejected it when applied to content-neutral regulation.[6] In fact, *Renton* itself eschews this analysis.

These cases recognized that once the governmental interest is identified the task of the reviewing court is to determine if the regulation is sufficiently narrow to avoid an overbreadth challenge and effectively promote the governmental interest.[7] As the Fifth Circuit pointed

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5. The Petitioners have seemingly dropped their argument advanced in the Court of Appeals that "the City must prove that 750 feet as opposed to some other distance is necessary to serve the City's interest." *S.D.J., Inc.,* 837 F.2d at p. 1275.

6. "The less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place and manner regulation. It is enough that the restriction substantially serve the government's legitimate ends." *Regan v. Time, Inc.,* 468 U.S. at 657.

7. Indeed, just this last term, this Court again recognized that "a statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz,* ____U.S.____, 56 U.S. Law Week 4785, 4788 (1988).

out, the fact that three Justices dissented from the summary affirmance in *Watseka* does not indicate that this Court has adopted the least restrictive means analyses as applied to adult business. *S.D.J., Inc.*, 841 F.2d 107, 109 (5th Cir. 1988). That inference could have been drawn only if the least restrictive means approach had been "essential to the affirmance and consistent with the Court's decisions in prior cases." *S.D.J., Inc.*, 841 F.2d at 109.[8]

It is axiomatic that the City of Houston has a legitimate interest in addressing societal concerns regarding crime, urban deterioration, neighborhood stability and the quality of life. *City of Renton*, 106 S. Ct. at p. 929; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 75 (1976). This governmental interest in preventing the adverse secondary effects of sexually oriented businesses is a constitutionally valid basis for subjecting such businesses to land use regulation. The Houston ordinance goes no further than necessary in scope in that it does not regulate interests unrelated to the concerns that it addresses. Unlike the ordinance at issue in *Schad v. Borough of Mount Ephraim*, the Houston ordinance does not ban all live entertainment. In fact, the Houston ordinance does not totally ban topless bars from the City, but merely regulates their location.

Petitioner asserts that because the City has regulated the number and amount of signs and the color of sexually oriented businesses that, under a least restrictive means analysis, this is as far as the regulation needs to extend.

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8. When the least-restrictive means analysis has been applied to regulations involving restrictions on protected activity it has usually been applied in the context of a total ban on an activity. *Cf. Schad v. Borough of Mount Ephriam*, 452 U.S. 61 (1981) (total ban on live entertainment); *City of Watseka*, 796 F.2d at p. 1557 (total ban on nighttime solicitation.)

This argument ignores the fact that the signage and exterior color restrictions are related to a particular secondary effect that these externalities of sexually oriented businesses have on minors.

While restrictions on exterior portions which allow modest, subdued advertising are appropriate in order to prevent a decline in the value of surrounding properties and thus prevent deterioration of neighborhoods, they may not address the issue of increased criminal activity as well as locational restrictions. Finally, both the signage and location requirements promote and further the government's preservation of property values and prevention of neighborhood deterioration.

C. The Houston ordinance provides for ample alternative avenues of communication.

The Fifth Circuit determined whether the Houston ordinance allows "ample alternative avenues of communication" by directing its inquiry into whether the ordinance refrains from effectively denying Petitioners a reasonable opportunity to open and operate a topless bar. *S.D.J., Inc.*, 837 F.2d at 1278. As the Fifth Circuit noted:

> Several experts testified as to potential alternative sites, estimating that 'at least 100' and perhaps up to 'tens of thousands' alternative sites exist. The 40 sites to which plaintiffs refer are those identified by one expert who studied approximately 20% of the City of Houston. Undoubtedly, other sites exist in the remaining 80% of the City. *S.D.J., Inc.*, 837 F.2d at 1277.

Petitioners' attempt to avoid this finding by arguing that the analysis undertaken was in conflict with the

holdings of this Court in *Young v. American Mini Theatres, Schad v. Borough of Mount Ephraim,* and *City of Renton.* While couched in terms that would indicate that the lower courts ignored the teachings of these three cases, Petitioners argument is little more than quibbling over whether or not the space is available.[9]

Renton and *Young* emphatically hold that the focus of the "ample alternative means of communication" prong of the First Amendment analysis to be applied to ordinances regulating the location of adult business is satisfied if "government refrains from effectively denying protected businesses a reasonable opportunity to locate within a community." *Renton,* 106 S. Ct. at 932. The testimony in the case *sub judice* makes it clear that the locations for sexually oriented businesses are adequate both in terms of numbers and character of land. Indeed, the sites identified included shopping centers, free standing buildings and raw undeveloped land on major thoroughfares throughout the City. (Tr. Vol. V, pp. 208-210, 216; *Area Maps,* Dx. Nos. 14 through 33.)

Petitioners finally argue that the Houston ordinance is unconstitutional because it does not contain a "grandfather" clause exempting existing business. The fact that the ordinance applies to existing businesses does not provide a reason for its invalidation. The test as to whether an ordinance regulating the location of a business engaged in First Amendment activities is a valid time, place and

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9. Petitioners reliance on a mathematical analysis is misplaced. The fact that the City of Renton, Washington has a population of 15,000 and room for 400 adult theaters is hardly relevant. Nor is a comparison of the percentage of land that may be utilized by adult businesses in Renton, Washington and Houston, Texas. The test is simply whether the City has refrained from denying Petitioners an opportunity to locate with the community. Here the City has demonstrated that sufficient locations exist to allow for topless entertainment within the Houston city limits.

manner restriction is not whether existing businesses are exempted from its terms, but whether the ordinance allows adequate alternative sites within the locality. Moreover, the topless bar owners have failed to show that there are no adequate relocation sites within the City of Houston. Absent such a showing, they cannot prevail. *Lydo Enterprises, Inc. v. City of Las Vegas,* 745 F.2d 1211, 1213 (9th Cir. 1984); *See also, Adult-world Bookstore v. City of Fresno,* 758 F.2d 1348, 1352 (9th Cir. 1985).

CONCLUSION

The Petition for Writ of Certiorari should be denied because the Fifth Circuit correctly applied this Court's decision in *City of Renton v. Playtime Theatres, Inc.* to the constitutional challenge to the Houston ordinance regulating the location, exterior decor and signage of adult businesses. The Fifth Circuit was correct in upholding the constitutionality of the Houston ordinance as a content-neutral time, place and manner regulation of the secondary effects of constitutionally protected activities.

Respectfully submitted,

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